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NOTES.

CARRIERS—JURISDICTION—DUTY TO SUPPLY CARS—CHARACTER OF VEHICLES—"OIL TANK CAR CASES"— Since the decision of the Supreme Court of the United States in the Abilene Oil Company case,[1] it has been settled that a purely administrative question arising under the Act to Regulate Commerce is primarily and exclusively for the determination of the Interstate Commerce Commission. This has repeatedly been applied in cases involving questions as to the reasonableness of rates or as to whether they are discriminatory, and questions involving discrimination with reference to car distribution. On the question of car supply, Sec-

[1] Texas & Pacific R. Co. v. Abilene Cotton Oil Company, 204 U. S. 426 (1907).

tion One of the Act to Regulate Commerce as amended by the Hepburn Act of 1906, after defining "transportation" as including "cars and other vehicles and all instrumentalities, and facilities of shipment or carriage," says that "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, . . ." Under this section questions at once arise as to the extent to which the enforcement of the obligation therein embodied calls for the determination of administrative questions.

That the jurisdiction of the Interstate Commerce Commission on the one hand, and of the courts on the other, depends upon whether the enforcement of this obligation requires the determination of an administrative or of a non-administrative question, was declared in the case of *Pennsylvania Railroad* v. *Puritan Coal Company*.[2] In that case, as in most of these cases, the railroad had a rule for allotting cars to the shippers. It was said that if this rule had been attacked as unreasonable or unjustly discriminatory, and if the action had thus involved scrutiny of the rule, an administrative question would have been presented over which the Commission would have had exclusive jurisdiction.[3] However, if the rule is admitted to be reasonable, but the complaint is directed against its unfair enforcement, or if the railroad has no rule for allotting cars, then no administrative question is involved and a claim for damages for failing, upon reasonable request, to furnish a shipper with a sufficient number of cars to satisfy his needs may be enforced in either a Federal or, by virtue of the provisions of Section Twenty-two of the Act,[4] in a state court, without any preliminary finding by the Interstate Commerce Commission; and this whether the carrier's default was a violation of its common-law duty existing prior to the Act, or of the duty prescribed by Section One of the Act as amended in 1906.[5]

[2] 237 U. S. 121 (1915). See discussion of this case in 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 787 (June, 1915).

[3] B. & O. R. R. v. Pitcairn Coal Co., 215 U. S. 481 (1910); I. C. C. v. Illinois Central R. R., 215 U. S. 452 (1910); Morrisdale Coal Co. v. P. R. R., 230 U. S. 304 (1913).

[4] Section 22 declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

[5] Eastern Railway Co. v. Littlefield, 237 U. S. 140 (1915); Illinois Central R. R. v. Mulberry Hill Coal Co., 238 U. S. 275 (1915); P. R. R. v. Clark Coal Co., 238 U. S. 456 (1915). In Vulcan Coal & Mining Co. v. Illinois Central R. R., 33 I. C. C. R. 52 (1915), decided several months before the Puritan Coal Company case, the Interstate Commerce Commission declared that the question as to the extent to which the railroad failed to comply with the duty it owed the complainants to furnish cars upon reasonable request therefor, was an administrative one of which the Commission alone can take original jurisdiction. This does not agree with the test of what is an administrative question as determined by the Puritan

In this connection two recent decisions of our highest tribunal are of importance. In *Pennsylvania Railroad* v. *Sonman Shaft Coal Company*,[6] a suit for damages was brought in a state court against a railroad for failure to furnish cars to a coal company. The conditions in the coal trade were normal and no question of discrimination was raised. Although the railroad had a rule for allotting cars which it had been following, no attack was made upon this rule. The Supreme Court of the United States held that the state court could entertain the action consistently with the Interstate Commerce Act, by reason of Section Twenty-two, which preserved the existing common-law remedies. No administrative question was involved, for, the conditions of the coal trade being normal, the duty of the carrier to have furnished the cars arose from the common law. Section One of the Act, as amended in 1906, was, for these purposes, regarded as merely adopting the common-law rule. In reply to the railroad's contention that the reasonableness of its rule of allotment was in issue and thus an administrative question presented for the Commission, the Court answered that where the conditions of trade are normal such a rule is unimportant, for the carrier's duty is measured by common law, that is, by the reasonable requests of the shipper based upon his actual needs. In the words of the Court: "It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

In the second case, known as the *Oil Tank Car Cases*,[7] decided just one week after the *Sonman Coal Company* case, the Commission had ordered the Pennsylvania Railroad to provide and furnish tank cars in sufficient number to transport the normal shipments of the complainant's oil. The Supreme Court of the United States held, that an order to provide such special cars was beyond the power of the Interstate Commerce Commission. Prior to 1906, the Commission had decided that the carrier's duty to provide and furnish equipment for the transportation of commodities might expand with time and conditions so that the special car would become the common car and the shipper's right to demand it would receive the sanction of the law. Thus cattle cars and refrigerator cars had, through the growth of trade, become

Coal Company case. The decision of the commissioners has been appealed from, and it has not yet been decided.

[6] 37 S. C. R. 46, decided December 4, 1916.

[7] United States and Interstate Commerce Commission v. The Pennsylvania Railroad: United States, Interstate Commerce Commission and Crew-Levick Company v. The Pennsylvania Railroad. Decided December 11, 1916. 37 S. C. R. 95.

so essential to the safe carriage of commodities, that they had received the sanction of the law, but it was the sanction of the common law and not of the Act to Regulate Commerce, and the remedy was in the courts and not in the Commission.[8] With this view of the carrier's obligation before the passage of the Hepburn Act of 1906, it remained for the Court to consider whether any change had been made by that Act. Section One of the original Act of 1887, had defined "transportation," as including all instrumentalities of shipment or carriage; the Amendment of 1906, as we have seen, defined it as including "cars and other vehicles and all instrumentalities and facilities of shipment or carriage." The Court held that there was no advance made or enlargement of meaning by the new definition, but it was simply a useless tautology. And also the addition to Section One of the words: ". . . it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor . . . ," were held not to bring the enforcement of this duty within the jurisdiction of the Commission. For there was no question of the carrier's duty to furnish the instrumentalities of transportation either under the Act of 1887, or under the Amendment of 1906, and it had already appeared that the Commission viewed the remedy as existing, under the former Act, solely in the courts. The words were, but the expression of a necessary implication, for, the duty having been imposed, it necessarily could be demanded.

Finally, it was argued that the Commission derived its power from Section Fifteen of the Amendment of 1910, which gave that body jurisdiction, among other things, over any regulations or practices which were unjust or unreasonable or unjustly discriminatory. Applying this section, it was contended that the neglect to provide or at least the refusal to furnish tank cars was a "practice." The Supreme Court refused to follow such a construction which, carried out to its logical conclusion would embrace every detail of railroad operation, their thought being that "if Congress had intended such a consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language, but would have put it in explicit declaration." There being, then, nothing which showed that the administrative power and remedy of the Commission under the Act of 1887, had been enlarged by the subsequent amendments, it followed that the order which they attempted to make was beyond their power.

What is the extent of the carrier's obligation to furnish equipment, in the light of these two recent decisions, both as to the num-

[8] *Re* Transportation, *etc.*, of Fruit, 10 I. C. C. 360 (1904); Rice v. Cincinnati, W. & B. R. Co., 5 I. C. C. 193 (1892); Scofield v. Lake Shore & Michigan Southern R. Co., 2 I. C. C. 90 (1888).

ber of cars, and as to the character of the vehicles? Regarding the number of cars, the extent of the obligation is summarized in the Sonman Coal Company case. In normal times the carrier's duty is measured by common law, that is by the reasonable requests of the shipper based upon his actual needs, and no administrative question is ordinarily involved. In such a situation, jurisdiction is not exclusively in the Interstate Commerce Commission, but can be exercised equally by the Federal or a state court. While in abnormal times, that is, in times of car shortage, the extent of the obligation to furnish cars is one of reasonableness which directly involves an administrative question and thus jurisdiction is exclusively in the Commission.[9] Regarding the character of vehicles, the Oil Tank Car cases hold that the extent of such obligation is measured entirely by common law and is enforceable at no time by the Commission, but solely by the courts. Whether the courts would compel the carrier to furnish special vehicles is another question depending, among other things, upon the conditions of trade and the business of the shipper.

P. H. R.

CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—RESTRICTIONS ON USE OF LAND—An increasing community sense throws into sharp relief the extremely individualistic attitude of the common law. In the contemplation of the latter the right of the land-owner extends *usque ad caelum*, and, subject only to the limitation that he inflict no injury upon another, he may use his property for any purpose he sees fit. It is only when a nuisance is created that his neighbors may invoke the aid of the courts. But the term *nuisance* has become associated largely with smudgy chimneys, defective reservoirs and cess-pools. Against the erection of structures repugnant to the artistic sensibilities of the neighborhood, there seems to be no remedy.

It is not that esthetic considerations are above—or beneath the jurisdiction of the courts. A municipality, it is now well settled, may impose taxes for just such purposes; it may acquire land to be used for parks, libraries, art-galleries, convention halls . . . provided only that it compensates the owner.[1] The point upon which the law is less satisfactory is as to the right of a city to enjoin the property owner from a use of his property which cannot be technically termed a nuisance.[2]

The present attitude of the courts can be stated briefly.

[9] This is, of course, *dictum* by the court, based upon the words in the Puritan Coal Company case.

[1] Attorney-General v. Williams, 174 Mass. 476 (1899).

[2] Commonwealth v. Boston Advertising Co., 188 Mass. 348 (1905).

"Esthetic considerations," it has been said, "are a matter of luxury and indulgence." [3] "The preservation of the architectural symmetry of Copley Square," is not a ground for restricting a property owner from a normal use of his property.[4]

Statutes aiming to preserve or enhance the beauty of a community are numerous, ranging from those which for police as well as for artistic purposes, limit the height of buildings in certain sections,[5] to those which prohibit the establishment of retail stores in residential neighborhoods.[6] Wherever the constitutionality of a statute of this type has been in issue, the individualistic test of the common law has been rigidly applied. "The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs." [7] The same considerations have declared unconstitutional a statute which forbade the erection of bill-boards or advertising signs within a certain distance from a municipal boulevard.[8] Unless essential to the public health, the public safety or the public welfare, no restriction upon the uses to which land may be put will be countenanced by the courts. A court will go further. It will inquire into the real purpose of any statute, and if it believes that the act is only ostensibly and not primarily a police measure, it will not uphold it.[9] So also it may consider the aim of the act to be police, and yet may hold it invalid because the execution of the act is left to the arbitrary discretion of a few individuals.[10]

In a very recent case a statute sought to prevent the erection of bill-boards upon the Palisades of the Hudson.[11] The act was declared unconstitutional. While this latest decision is in accord with the traditions of the American courts, it leaves open several effective loop-holes by which the general purpose of such a statute may be brought about. Civic beauty and civic safety are not irreconcilable terms, and if an act can be justified as a valid exercise of the police power, the fact that it incidentally conduces to beautify the city, will not invalidate it.[12] In many cases, too, esthetic considerations *have* been taken into account by the courts. It has

[3] Cochran v. Preston, 108 Md. 220 (1908).
[4] Attorney-General v. Williams, *supra*.
[5] Esbank v. Richmond, 226 U. S. 137 (1912).
[6] People v. Chicago, 261 Ill. 16 (1913).
[7] Curran Bill Posting Co. v. Denver, 47 Col. 221 (1909).
[8] Commonwealth v. Boston Adv. Co., 188 Mass. 348 (1905).
[9] Haller Sign Works v. Physical Culture School, 249 Ill. 436 (1911).
[10] Bostock v. Lewis, 95 Md. 400 (1902).
[11] State v. Lamb, 98 Atl. 459 (N. J. 1916).
[12] Welch v. Swasey, 193 Mass. 364 (1907). Affirmed in 214 U. S. 91 (1908).

been judicially recognized that a manufacturing district must submit to annoyances which would be enjoined in a residential neighborhood.[13] And the converse of the proposition is often decided though seldom clearly expressed. In addition, an offensive odor seems to be a nuisance *per se*, its effect on the health of the community being immaterial. It is difficult to grasp the logical difference between this form of nuisance and an architectural monstrosity that is an eye-sore to surrounding residents. The practical consideration that seems to determine the stand of the courts is, that the first, the nasal, sense is universal. No expert testimony is necessary, and no conflict of testimony is likely. The artistic sense, on the other hand, is localized in a comparatively few of the esthetically cultivated, among whom also there are apt to be essentially divergent views as to what constitutes good taste.

Unfortunately the very material aspect of the question has not been stressed. The man who opens up a laundry in a residential section may outrage the refined sensibilities of his neighbors. In so far the result is merely sentimental and properly disregarded by the law. But very often the value of property in the vicinity is considerably lowered. The exercise of certain rights of ownership by one party may reprive a hundred others from using their property in a normal manner. The use of one property for manufacturing purposes may preclude the use of adjacent property for any but the same purpose.

The present attitude of the courts leaves much to be desired. But it is definite. An alternative view would unsettle the property rights of the community. In an extreme case, for example, it was sought to prohibit the erection of residences near a drive-way which skirted the shore of a bay, because they obstructed the view to the bay and the breezes therefrom.[14] The merits of such a controversy cannot be decided by the courts, nor indeed by the executive of legislative departments under our conception of government. Another philosophy of government which has emphasized the paramount importance of the state has enabled the continental authorities to achieve a standard of municipal development which is the envy of American cities. It is a curious paradox, that at this time when the collective sense is stronger than ever before in America, paternalism in government is under a ban, and individual freedom is deemed the special jewel of Anglo-Saxon jurisprudence.

B. W.

INTERNATIONAL LAW—CONTRABAND—CONFISCATION OF VESSEL CARRYING CONTRABAND—In the light of the present war conditions, the problem of the penalty to vessels of neutrals for the car-

[13] Sullivan v. Steel Company, 208 Pa. 543 (1904).
[14] Quintine v. Bay St. Louis, 64 Miss. 483 (1886).

riage of contraband to a belligerent, assumes a position deserving of especial consideration.

The doctrine that commerce in contraband is free to citizens of a neutral State in so far as that State is concerned while to the belligerent who is injured is left the right to confiscate the commodities in question, if they can be captured, was early announced in this country.[1] And the present administration has affirmed it time and again. The question as to when that right exists is, of course, dependent upon the rules of so-called International Law, as interpreted by the courts of the one or the other belligerent as the case may be. Since the difficulties can only arise when a state of war exists, and wars being comparatively infrequent, tribunals have not been on so safe a ground as in other matters usually brought before them for judicial decision; nor can the psychological effect of the fact that the respondent vessel was intended to aid the enemies of their country be discounted.[2] So that the question has rather been the subject of diplomatic agreements as exemplified by treaties,[3] or conferences between the representatives of the various powers.

As late as in 1908 such a gathering was held in London, to which each of the powers was invited to submit a proposal for regulating the problem. It resulted in the issuance of the "Declaration of London."[4] While this was not accepted in whole by any of the powers, certain sections, notably Article 40, to be discussed later, were definitely adopted by England and her allies and tentatively by most civilized states.

It is first important to determine just what contraband, in this sense, includes. In general it may be said to mean not only articles such as arms, ammunition and other objects of immediate use in war, but also many others which, though ordinary commerce in times of peace, become contraband in war times, when the destination of such articles indicate that they are intended for the use of the military or naval forces of the enemy.[5] As early as the sixteenth century warring powers began to deny the right of contract between neutral nations and their enemies, free from their inter-

[1] Am. State Papers. For. Rel. 1, 147 (1793); *Id.*, 1, 646 (1796).

[2] "The truth is that the feeling of the country was deep and strong against England, and the judges as individual citizens were no exception to that feeling, besides the court was not then familiar with the law of blockade." Excerpt from a letter from Mr. Justice Nelson (U. S. Supreme Court) to Mr. Lawrence. Quoted in Hall "International Law," p. 666.

[3] United States and France. De Martens, Rec. VII, 104 (1800); United States and Central America Now. Rec. VI, 34 (1828).

[4] Signed February 26, 1909. Ratification advised by Senate, April 24, 1912.

[5] Fenwicke "Neutrality Laws of the United States," page 104, and see the classification under "Declaration of London."

ference. Warnings were issued, threatening the seizure of certain commodities on their way to enemy ports. Hence the name "contraband" as being *contra* to the ban or edict.[6]

At this time there existed two distinct schools, each entertaining well set principles as to the right of condemnation and confiscation. At the head of one stood France,[7] while England championed the other.[8] The British plan included besides goods absolutely contraband, a list of so-called "Conditional Contraband." Goods of this class, when captured, were not confiscated, but the taker paid the owner thereof due value and also all freight charges. This proceeding was called "pre-emption." [9] On the other hand the French stoutly denied the exercise of this right, but maintained the doctrine of strict accountability of the neutral. Necessarily many articles, included in the English conditional lists, were held as absolute contraband by the advocates of this school. Both agreed, however, that any belligerent might add to the list by warnings issued before seizure.[10] In view of the determination of both factions it is easy to see that no agreement might be proposed suitable to both. In 1907 at the "Convention at the Hague," in spite of proposals, and counter proposals, the representatives were obdurate and the question was passed over. In 1908 at the London Conference, *infra,* the novel scheme of setting down certain articles, not contraband, was adopted, but nothing further was accomplished.

Turning now to the liability of the carrier. The present status of the law as exemplified by the recent case of the *Hakan* [11] is a development of three successive stages. Before the Napoleonic wars the prevalence of opinion was that neutral vessels carrying contrabands of war were just as subject to capture and condemnation as were the goods themselves,[12] the theory being that the guilt of him who makes possible the performance of the contract of sale, *i. e.,* the carrier, was just as great as the seller. Since the latter upon capture lost his goods, the former should suffer a like fate.

The second stage was represented by the so-called "Indulgent Rule" adopted in the American case of the *Bermuda,*[13] requiring for the confiscation of the vessel bad faith on the part of the owner thereof.[14] This view is explained on the ground that the owner

[6] The first use of the word in this context was in the Treaty of Southampton between England and the United Provinces (1625). Twiss "War," page 121.

[7] Dumont, t. 6, part 2, p. 266.

[8] Treaty of Southampton. See note 6, *supra.*

[9] Admiralty Manual, Art. 64.

[10] Life and Correspondence of Sir Leoline Jenkins, v. 2, p. 751.

[11] 115 L. T. R. 389 (Eng. 1916).

[12] The *Neutralitet,* 3 Ch. Rob. 295 (Eng. 1801).

[13] 3 Wall. 514 (U. S. 1865).

[14] Such as concealment of papers, change of destination or a part ownership of both cargo and vessel.

of the vessel does not necessarily know the character of the cargo and therefore should not be compelled to suffer, having done no affirmative wrong. However, since the defense is based in knowledge, proof of it to the owner destroys the immunity and the vessel again becomes subject to seizure.

As said before Article 40 of the London Declaration, *supra,* has been accepted by most states. It represents the transition to the third stage and provides for the confiscation of the vessel, if one-half the goods carried, in value, weight, volume or freight is contraband. Under it the *Hakan, supra,* is decided. The defense raised was that the old American idea of *mala fides* in the owner prevailed, and that Article 40, and its adoption by Orders in Council was *contra* to International Law and invalid, but the court, citing the proposition of the United States, at the London Convention [15] as expressive of the change of sentiment, adopted the rule of Article 40 as controlling and firmly settled it as being the law with its stamp of judicial approval.

P. F. N.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD ON HEARSAY EVIDENCE—Many of the Workmen's Compensation Acts of this country provide that the administrators of the Act, Industrial Commissions, *etc.,* are not to be bound by the formalities of legal procedure in passing on the merits of cases arising under the Act, and some even specifically point out that the Commission or Referee may disregard the common law and statutory rules of evidence and procedure other than those presented in the Workmen's Compensation Act itself. The purpose of such enactments is, of course, that the utmost freedom shall be allowed in the investigation of a claimant's right to compensation, to the end that relief may be granted in worthy cases as speedily as possible. Under such statutory directions the question of the admissibility of hearsay evidence in proceedings under the Compensation Acts is of considerable importance. In a former note [1] it was pointed out that in nearly all jurisdictions the findings of fact of the administrative body, hereafter called the Commission, are final and not subject to review by the courts. It will be seen from that note that in general the Commission must act within its powers in making an award, that it has no right to act on mere supposition, guess work or conjecture, nor can it base an award on legally incompetent evidence; and that it is generally agreed that the mere

[15] The proposals of the United States to the conference are embodied in the Naval Code of 1900 with the Amendment of 1903. They were prepared by Rear-Admiral Stockton, U. S. N., under the guidance of the Secretary of State, and endorsed by the President.

[1] 64 UNIV. OF PENNA. L. REV. 744, May, 1916.

admission of what in a regularly constituted court of law would be incompetent evidence will not of itself invalidate an award. Therefore, in the light of the statute provisions referred to, we have presented in this discussion the question: is pure hearsay legally competent evidence on which facts may be found and an award based?

The Court of Appeals of New York has answered the question in the negative. In *Carroll* v. *Knickerbocker Ice Co.*,[2] that court laid down the rule that while the admission of hearsay evidence was justified by the statute,[3] there must be some evidence of a legally competent nature and of recognizedly probative value on which an award may be based. In this case the workman was employed in delivering ice. The Commission found that on a certain date while he was so engaged, the tongs slipped and a three-hundred-pound cake of ice fell and struck him in the abdomen, causing an epigastric hemorrhage. He was then taken to the hospital where he developed delirium tremens and died a few days after the alleged accident. The Commission's finding was based solely on the testimony of witnesses who related what Carroll had told them as to the cause of his injury. These statements were made under such circumstances that they could not be admitted as *res gestae* in ordinary legal proceedings. On the other hand there was the direct testimony of others that they were present at the time and place when it was alleged that Carroll was injured, and that they saw no accident whatever and saw no cake of ice fall.

The Appellate Division of the Supreme Court upheld the decision of the Commission, but by a divided court.[4] Judge Howard in delivering the opinion of the majority, decided that the Commission was authorized and even bound to ignore all the formulated rules of evidence heretofore established both by common law and by statute, and that the spirit of the Compensation Act authorizes the Commission to make its investigation in any manner it chooses, wholly unfettered by any law previously invented by man, and that it is to be bound neither by custom nor precedent. Judge Woodward in a very able dissenting opinion held that the right to compensation must be predicated on the determination that the worker's earnings were cut off by "disability or death . . . resulting from an accidental personal injury . . . arising out

[2] 218 N. Y. 435; 113 N. E. 507 (1916), reversing 169 App. Div. 450 (1915).

[3] New York Laws 1914, Chap. 41, Sec. 68: *Technical Rules of Evidence or Procedure Not Required.* The Commission or commissioner or deputy commissioner in making an investigation or inquiry, or conducting a hearing, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry, or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

[4] 169 App. Div. 450 (N. Y. 1915), annotated in 64 UNIV. OF PENNA. L. REV. 325.

of and in the course of the employment"[5] and that before any award can be made *actual proof* that the worker sustained an accident which arose out of his employment must be given and that the accident caused the injury to his person which resulted in disability or death, and that under no circumstances can the testimony adduced to prove the plaintiff's claim be considered actual proof.[6] Section 68, therefore, cannot be construed to warrant the Commission to make a finding and award without legal evidence to sustain it, although the Commission has the right to admit proferred proof freely and liberally with a view to developing all the facts, and in fact to take any measures which will help it to clear up the situation and lead it to a knowledge of the actual facts. To this end technical rules of evidence cannot be allowed to hinder an investigation. But no matter how much extraneous matter is thus developed there must remain a residuum of legal proof upon which an award may be based.

It will be seen that the fundamental difference between the views above stated is this; the majority acts on the theory that the Commission in its administration of the law needs merely to be convinced through its investigation of the justice of the claim, and may arrive at its conviction through any fair means, excluding supposition or conjecture, and if it believes hearsay testimony credible it may act upon it; on the other hand the minority hold that the change in the law affects merely the procedural limitations on a legal inquiry, and actual proof, *i. e.*, some evidence of a recognizedly probative value is essential to a just conclusion.

The same distinction is preserved in the Court of Appeal, which by a divided court reversed the Appellate Division. Justice Cuddeback, speaking for the majority, delivered an opinion approving the dissenting opinion of Judge Woodward, pointing out that the only substantial evidence before the Commission was to the effect that there had been no such accident as alleged. Chief Justice Willard Bartlett concurred in the result, but indicated a broader attitude towards the effect of hearsay under the Act.[7] In a dis-

[5] New York Laws 1914, Chap. 41, Sec. 10.

[6] "The change in the fundamental spirit and purpose of our statutes governing indemnity for industrial accidents has in no wise waived or lessened the necessity for actual proof of the accident, its relation to the employment, the resultant injury, and the consequences of that injury." Woodward, J., in 169 App. Div. 450, p. 455.

[7] "I think that the Workmen's Compensation Law permits the Commission to base an award upon hearsay evidence, in the absence of substantial evidence to the contrary; but where, as in the present case, the hearsay evidence is directly contradicted by the testimony of eye-witnesses to the event, it does not suffice to raise any issue of fact. This view accords with the liberal spirit of the enactment without giving to hearsay evidence a sanction which I cannot believe the Legislature intended to give it." Opinion of Willard Bartlett, C. J., 113 N. E. 507, p. 509; 218 N. Y. 435, p. 441.

senting opinion Justice Seabury declares that the Legislature when it enacted the law, did so to further the social interest of the community at large, and that in its interpretation the social point of view should be considered rather than the juristic viewpoint developed through centuries of common-law tradition.[8] Justice Seabury also remarks on the inconsistency of holding, as do the majority, that such evidence may be admitted and yet an award may not be based on it. "If the Legislature sanctioned the admission of this evidence, it follows by necessary implication that it intended to authorize the Commission to act upon it." And again, to sustain an award based on hearsay does not mean that the Commission must act on all hearsay, but only that it may act on it when the circumstances are such that it is deemed by the Commission to be trustworthy.

In the administration of the English Act, the courts have uniformly refused to allow awards based on hearsay, although they generally allow a liberal interpretation of the doctrine of *res gestae*.[9] In an Irish case one of the Justices was of the opinion that an award based on hearsay, particularly on statements made by a deceased workman as to the cause of his injury, could be upheld on the ground that in many instances there is no other possible evidence,[10] but in a later case the same Justice acceded to the general English rule.[11]

[8] "The Workmen's Compensation Law is a new step in the field of social legislation. We should interpret it in accordance with the spirit which called it into existence. . . . This court is under no obligation to see to it that laws enacted to remedy abuses arising from new industrial and social conditions shall be made to square with ancient conceptions of the principles of the common law." Dissenting opinion of Seabury, J.

[9] "In cases of this kind we do give considerable latitude in admitting the statements of deceased persons under the head of what is called *res gestae*. But to admit these statements in evidence (statements by deceased workman to his wife as to cause of his illness) would be to go far beyond what the court has ever sanctioned and contrary to English law." Fletcher Moulton, L. J., in Gibbey v. Great Western Ry. Co., 3 B. W. C. C. 135 Amys v. Barton, 5 B. W. C. C. 117 (1912); and even where the statement was against the interest of the workman, Tucker v. District Council, 5 B. W. C. C. 296 (1912).

[10] Cherry, L. J., in Wright v. Kerrigan, 4 B. W. C. C. 432 (1911).

[11] "I must confess that in Kerrigan's case (*supra*, note 10), my opinion was that there was no evidence whatever as to the cause of the injury or as to its having been incurred in the course of the man's employment, unless the statements of the man himself were admitted in evidence. I was always under the impression that in such cases the best and, in many cases, the only evidence that can be obtained, as to the nature and effects of an injury, is the statement of the injured man himself, and that evidence as to the nature of the injury includes not only the physical fact of the injury, but also the immediate cause. It is an additional part of the statement as to the nature of the injury. However, the English decisions that have been cited to us hold otherwise, and must be followed by us. It will have the effect of shutting out hundreds of cases where

There are few American cases and all of them reach practically the same conclusion. In *Englebretson* v. *Ind. Acc. Comm.*,[12] the court held that the rule against hearsay is not a mere "technical rule of evidence," but is of a substantive nature, and that a statute providing that the Commission "shall not be bound by the technical rules of evidence," does not authorize an award on hearsay evidence.[13] In *Reck* v. *Whittlesberger*,[14] it is stated that the mere admission of hearsay evidence is no ground for reversal as long as there is other evidence of a substantial nature on which an award can be based.

The question has not yet come before the Pennsylvania courts. It remains to be seen whether they will adopt the strict construction given in the *Englebretson Case*, or the happy medium proposed by Chief Justice Willard Bartlett which seems to be the most sensible and really just solution of the difficulty.[15]

T. L. H.

EDITOR'S NOTE—Since the note discussing the *Carroll Case* was written, the case of *Botto* v. *Hamilton* has been decided by the Court of Common Pleas of Philadelphia.[1] In that case a workman suffered an injury to his arm, which resulted in blood poison and his subsequent death. It was alleged that he fell while at work and injured his arm there. The Board found this to be the case, and based its finding and award on the testimony of the mother of the workman as to what he told her four days after the accident as to the cause of his injury, and the testimony of two other employes, who saw him fall in such a way as to make it quite likely that the wound which caused his death was received in the fall. It appears that the purely hearsay evidence of the mother resulted in obtaining the corroborating testimony. The defendant attempted to have the award set aside, on the ground that it was based on hearsay evidence. The Court sustained it, however, on the ground that

no other evidence of the nature of an injury is obtainable. We cannot be responsible for that." Cherry, L. J., in Donaghy v. Ulster Spinning Co., 46 Ir. L. T. 33 (1912).

[12] 151 Pac. 421 (Cal. 1915). *Accord*, Employer's Assur. Corp. v. Ind. Acc. Comm., 151 Pac. 423 (Cal. 1915).

[13] Cal. Laws 1913, Chap. 176, Sec. 17.

[14] 181 Mich. 463 (1914). And see Fitzgerald v. Lozier Co., 154 N. W. 67 (Mich. 1915); Pigeon's Case, 216 Mass. 51 (1913).

[15] Pennsylvania Act of 1915, P. L. 736. Section 409 provides: "The Board's findings of fact shall in all cases be final." Section 428 reads as follows: "Neither the Board nor any Referee shall be bound by the technical rules of evidence in conducting any hearing or investigation."

[1] Botto v. Hamilton, C. P. No. 4, Philadelphia, No. 3555, Sept. Term, 1016. Decided, opinion handed down January 8, 1917. Affirming decision of Workmen's Compensation Board, 2 Pa. Dep. Rep. 2438 (Oct. 28, 1916).

the direct testimony which was apparently elicited as a result of the hearsay was of a sufficiently substantial character to justify the award. On the question of hearsay the Carroll Case is cited as an authority, and practically the same position adopted as in that case. The Court views the Referee in a dual capacity, as an investigator and as a judge of facts. In his capacity as an investigator he is not to be hindered by technicalities, nor prevented from making use of such information as he may receive in order to arrive at some "substantial proof." On the other hand, "when he comes to pass on the evidence as a judge, he should be guided by the rules which experience has taught are reliable." Further, "the rule excluding hearsay is not 'technical.' It is fundamental." And Section 428 is not broad enough to justify an award based solely on hearsay.

If the rule excluding hearsay is "fundamental" it is difficult to understand how it may be admitted for any purpose, even for eliciting further evidence of a more substantial character. Again, hearsay when corroborated by other testimony and by the surrounding circumstances is deemed to furnish reliable grounds for an award. Such corroboration, as in this case, only serves to prove the initial trustworthiness of the hearsay. Would it be any the less trustworthy because the supplementary direct evidence did not happen to be discovered? The fallacy of the attitude of the court in the *Carroll Case* and in the *Botto Case,* seems to lie in the conception of hearsay evidence as something essentially unworthy of credence under any circumstance. It is undoubtedly true that hearsay is in many cases unreliable and apt to mislead the minds of those untrained to sift and weigh the probative force of evidence. To this end it is wisely excluded from the consideration of juries in trials at law. But here we have a body of administrative officers, trained investigators, and competent to estimate at its true value the worth of evidence adduced to prove claims before them. Yet if they are convinced of the truth and justice of a claim, they are not allowed to act in the absence of what is termed "substantial proof." When the reason for the rule disappears, the rule itself should fall. There are many exceptions to the rule against hearsay, because in certain circumstances it is considered unlikely that such evidence would be unreliable. It is more unlikely and improbable that a body of men trained to the consideration and investigation of compensation claims would be deceived by what we may call the "grosser" form of hearsay.

T. L. H.

TORTS—INJURY TO INFANTS—NEGLIGENCE OF PARENTS IMPUTED TO CHILDREN—While the settled law in a majority of jurisdictions in this country and England allows a child of tender years recovery for injuries sustained while in the custody of a negligent

parent, some courts deny recovery on the ground that the negligence of the parent is imputable to the child. Thus the recent case of *Morgan* v. *Aroostook Valley R. R. Co.*[1] is an example of the judicial conservatism which still cherishes the doctrine now being repudiated by the general trend of decisions. In this case a child less than two years old, while playing in its parents' yard, managed to escape onto the street where it was permanently injured by a passing electric motor engine. While damages were allowed, it being found that the parents knew of no defect in the fence, the court insisted that no recovery could be had were they negligent in their custody of the child. It declared that a duty devolved on them to exercise reasonable care in protecting the child and keeping it off the streets and other places of danger and in case of failure so to act their negligence would defeat any right of the child to recover, since such negligence was imputed in every case to the child.

The early American case of *Harfield* v. *Roper*[2] is a leading authority for this doctrine of imputability. Under facts similar to the Morgan case the court found for the defendant on the ground that the want of due care on the part of the parents or guardians of a child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult. There seemed to be a disposition on the part of this court and those following it, to search for something to set off against the negligence of the defendant. The child was where it should not have been; no accident would have occurred had it not strayed into the street. Someone is responsible for this contributory negligence The child not being *sui juris,* is incapable of it; care and prudence equal to its capacity are alone required of it. The parents must judge for it if a place be one of danger and, having failed to do that, the child must suffer along with the parents. The principle really involved is that of group identification. The whole family had to suffer for the failings of any member; a two-year-old child being no exception. Everyone owes a duty so to conduct himself and his machines as not to injure another; if that other is a lunatic, an invalid, or an infant, some one owes the duty for him. If that protector or custodian is deficient, his ward, having no higher rights, than any other, must suffer with him. This doctrine, unsocial and certainly illogical if carried out into all the variations of contract law especially, is to-day still countenanced by some courts of the country.[3] It allows a defendant to escape liability where the plaintiff injured is a child of tender years. It awards damages where that age is past, as where an infant of eight or nine is injured, for

[1] 98 Atl. 628 (Me. 1916).

[2] 21 Wendell 615 (N. Y. 1839).

[3] D., L. & W. Rwy. Co. v. Devore, 114 Fed. 155 (1902); Holly v. Boston Gas Light Co., 8 Gray 123 (Mass. 1857).

such a one is able to take care of himself even though his parents have let him roam the streets. And hence because he is beyond tender years their negligence is not imputed to him. In other words the question is not whether an unavoidable accident has resulted from the incapacity of the child or lunatic, but rather, there being negligence on the part of the defendant, is he to be exonerated whenever the victim of that negligence is a child or lunatic whose guardian has carelessly allowed him to escape.[4]

The minority courts seem to have ignored the true principle concerned. What bearing has the negligence of a custodian on the legal result involved where a child receives injuries while in the custody of its parent or one in *loco parentis?* The defendant owes a duty to the child under all circumstances, the measure of it being his notice of risk and his power to avoid it. Why then should the diligence or the lack of it in the custodian, in giving occasion for the risk to exist, vary that duty? This seems especially inexplicable in those cases where he is not present at the scene of the accident. The trend of decisions is fortunately in the direction of real justice toward the extremely young and those otherwise in need of the protection of others.

The better law as expressed by the highest tribunals in this country and England repudiate the doctrine of imputability. It declares that in an action by an infant in its own right for personal injuries resulting from the negligence of a third party, the fault or negligence of its parents or custodian, contributing to the injury, cannot be imputed to the child.[5] This is true even where the parents have been warned of a certain danger.[6] It applies to all manner of cases, where the child wanders unprotected on the streets,[7] where it is thrown from a trolley car,[8] where it is playing on the sidewalk and gets into the highway.[9] In no case will the contributory negligence of the parent be a defense unless the child has committed or omitted an act which in an adult would be negligent.[10] Nor will the defendant be excused when the parents have been negligent, if with

[4] Wharton on Negligence (2d Ed.), p. 283.

[5] Chicago G. W. Rwy. Co. v. Kowalski, 92 Fed. 310 (1899); Berry v. Rwy. Co., 70 Fed. 679 (Ind. U. S. C. C. 1895); Rwy. Co. v. Wilcox, 24 N. E. 419 (Ill. 1890); Rwy. Co. v. Schuster, 113 Pa. 412 (1886); Newman v. R. R. Co., 19 Atl. 1102 (N. J. 1890).

[6] Fink v. City of Des Moines, 89 N. W. 28 (Iowa 1902).

[7] Trumbo's Adm. v. City Street Car Co., 17 S. E. 124 (Va. 1893).

[8] Nashville R. R. v. Howard, 78 S. W. 1098 (Tenn. 1904).

[9] Dehmann v. Beck, 70 N. Y. S. 29 (1901).

[10] Lynch v. Smith, 104 Mass. 52 (1870); O'Brien v. McGlinchy, 68 Me. 552 (1878); Rwy. Co. v. Robinson, 27 Ill. App. 26 (1887); McLain v. Van Zandt, 39 N. Y. Super. Ct. 347 (1875).

the exercise of proper care he could have avoided the injury,[11] or if there has been gross negligence on his part.[12]

Of course in all cases the contributory negligence of the parent must be that of a custodian. So in *Hennessey* v. *Brooklyn City R. R. Co.*,[13] a child in its mother's arms in a carriage driven negligently by the father was not denied recovery because it was in the immediate custody of the mother and not of the father. This case is an example of the departure from the idea of group identification. At least it shows that such a principle is incorrect, since it confuses legal rights with family relationship. As one court has expressed it, "the physical fact is that parent and child are not identical, either in body or property rights."[14] The money which arises from damages for an injury to the child in its action against the wrongdoer is the child's own property for the damage done is its own suffering and loss. "The child, however young and helpless, and however dependent upon the parent for care and protection, is nevertheless a separate entity."[15] Hence the injury which a wrongdoer inflicts upon an infant is not excused by the negligence of a third party even though it be the parent. This is the sane and correct view which justice demands and which the majority of jurisdictions now agree upon.

There is a noteworthy exception to the general rule maintained in several English cases, particularly that of *Waite* v. *Northeastern Ry. Co.*,[16] where an infant plaintiff was denied recovery for a railway accident occurring while the child was in its grandmother's custody. The court held that the contributory negligence of the custodian was a bar to recovery largely because the liability of the defendant was limited by the terms of the contract of carriage, which was upon the "implied condition" that the child was to be accompanied by the person having it in charge. The company issued a half ticket on the understanding that it received the child as under the control and subject to the management of the custodian. This presents an interesting exception to the great trend of authority and shows but one more of the many possible phases which the relation of parent and child can assume in the law of negligence.

H. D. S.

[11] Donahoe v. Wabash, *etc.*, Rwy. Co., 83 Mo. 543 (1884); Connery v. Slavin, 23 N. Y. Week. Dig. 545 (1886); Baltimore City Pass. Rwy. Co. v. McDonnell, 43 Md. 535 (1876).

[12] Schierhold v. R. R. Co., 40 Cal. 447 (1871); Kenyon v. R. R. Co., 5 Hun 479 (N. Y. 1875).

[13] 39 N. Y. Supp. 805 (1896).

[14] Profit v. Chicago G. W. Rwy. Co., 91 Mo. App. 369 (1902).

[15] *Ibid.*, p. 377.

[16] 1 Ellis, B. & E. 719 (1858).